No. 22,295

# United States Court of Appeals
FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

LABORERS & PLASTER TENDERS, LOCAL 507,

*Respondent.*

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On Petition for Enforcement of An Order of the
National Labor Relations Board

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## AUTHORITIES CITED

**Cases:**

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## JURISDICTIONAL STATEMENT

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of

[1] The pertinent statutory provisions are reprinted, *infra*, pp. A-1 to A-2.

its order (R. 19, 28-29),[2] issued on January 4, 1967 against respondent. The Board's decision and order are reported at 162 NLRB No. 55. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at La Mirada, California, within this judicial circuit. No jurisdictional issue is presented.

## I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening the president of a neutral employer with an object of forcing him to cease doing business with the primary employer (R. 14-20, 27-28). The Board's findings may be summarized as follows:

Kon Lee Building Company (hereinafter "Kon Lee"), a California corporation in the building construction industry, was, at all material times, a general contractor engaged in the construction of a 158-bed hospital at La Mirada (R. 15). S & H Concrete Construction Inc. (hereinafter "S & H"), whose employees are represented by respondent Laborers, was hired as a specialty contractor by Kon Lee to perform cement work at the hospital project in the spring of 1966 (*ibid.*). On April 13, 1966, the Building and Construction Trades Council of Los Angeles (hereinafter "Council"), which represents employee members of affiliated organizations, including respondent Laborers, began picketing the project with signs which read (R. 15; Tr. 6):

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[2] References designated "R." are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testimony reproduced, pursuant to Court Rules 10 and 17. References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

> Kon Lee Bldg. Co., Unfair to Los Angeles Building and Construction Trades Council, AFL-CIO - No Agreement

S & H employees reporting for work that day refused to cross the picket line, and called the president of S & H, Henderson, for instructions (R.16; Tr. 9). Henderson, after calling a business agent of respondent Laborers and ascertaining that there was a picket line at the project directed against Kon Lee, ordered his employees not to work (R. 16; Tr. 9-10).

The next day, Kon Lee established a reserved gate at the Liutweiler Avenue entrance to the project, at which the following sign was posted (R. 15: Tr. 6).

> Notice: All persons, contractors, their employees, and their suppliers must use this entrance and exit for work or deliveries to and from job sites except Kon Lee Building Company and their suppliers, who must use the entrance located one block east on Los Coyotes Avenue - Signed, Kon Lee Building Company, General Contractor.

At the Los Coyotes Avenue entrance, a sign was posted reading (R. 16; Tr. 6-7):

> Notice: This entrance is for the sole and exclusive use of Kon Lee Building Company and their suppliers. All other persons must use entrances located one block west on Liutweiler Avenue - Signed, Kon Lee Building Company, General Contractor.

Kon Lee informed Henderson that the reserved gate had been established, and asked him to send his men back to work. Henderson did so after verifying that there was no picket line at the reserved gate (R. 16; Tr. 11).

A day or two later, Frank Fuentes, a business agent for the Laborers, called Henderson, informed him that he and his men had been observed working at the project, and warned him that because they had "crossed the picket line" Henderson was "liable for each man. Each man is liable for a $200 fine." (R. 16, 17; Tr. 14, 29). Fuentes then put his superior, Graves, on the line; Graves said that "if there was no picket on the job . . . no one could stop [the employees] from working." (R. 18; Tr. 30).

## II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening the president of S & H in order to put pressure on S & H to cease performing work for Kon Lee. The Board's order requires respondent to cease and desist from the unfair labor practice found and to post the usual notice.

## ARGUMENT

### SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT RESPONDENT VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT

Section 8(b)(4)(ii)(B) of the Act provides, in relevant part, that it is an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * *

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * .

Section 8(b)(4) thus renders unlawful the implication of neutral employers in disputes not their own where an object is to force the cessation of business relations between the neutral employer and any other person. "The impact of the section is directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.' *International Brotherhood of Electrical Workers v. N.L.R.B.*, 181 F. 2d 34, 37." *Local 761, International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 366 U.S. 667, 672.

Two elements are necessary in order to find a violation of Section 8(b)(4)(ii)(B): first that a labor organization or its agents must "threaten, coerce or restrain" an employer; and second, that an object of its conduct must be the cessation of business between two employers. Regarding the latter element, "[t]he Union's 'object' may be inferred from its acts." *New York Mailers Union No. 6 v. N.L.R.B.*, 316 F. 2d 371, 372 (C.A.D.C.); *See also, Local 761, IUE v. N.L.R.B.*, 366 U.S. 667, 674. Since the only dispute involved herein was that between the Council and Kon Lee, it can hardly be disputed that an object of respondent's conduct was to force or require S & H, a neutral employer, to cease doing business with the primary employer, Kon Lee.

Nor can there be any doubt that respondent's threat to fine S & H employees for crossing the picket line constituted "coercion" within the meaning of the Act. The legislative history

of Section 8(b)(4)(ii)(B) shows that Congress intended to foreclose not only force, violence and picketing as means of pressuring a neutral secondary employer, but also threatening him "with labor trouble or other consequences"[3] or "with a strike or other economic retaliation."[4] See *N.L.R.B. v. Local 825, Operating Engineers*, 315 F. 2d 695, 696-698 (C.A. 3); *N.L.R.B. v. Highway Truck Drivers & Helpers, Local No. 107*, 300 F. 2d 317, 320-321 (C.A. 3); *N.L.R.B. v. District Council of Painters No. 48*, 340 F. 2d 107, 110-111 (C.A. 9), cert. denied, 381 U.S. 914. As the Supreme Court has noted, "the prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. (Tree Fruits)*, 377 U.S. 58, 68.

The coercive nature of respondent's conduct in this case is clear. Union business agent Fuentes specifically told S & H president Henderson that his men were each "liable for a $200 fine" for crossing the picket line.[5] Union official Graves stated to Henderson that no one could stop the employees from working if there was no picket at the site. Coupled

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[3] II Leg. Hist. 1586(2) (105 Cong. Rec. 15552).

[4] *Id.*, at 1523(1) (105 Cong. Rec. 14347, 15544-15545).

[5] The evidence supporting the Trial Examiner's finding on this point stands without contradiction on the record, due to respondent's failure to produce any witnesses in rebuttal. Respondent's assertion that it was deprived of an opportunity to present any rebuttal evidence (R. 33) is patently without merit. The record reveals that one of respondent's witnesses was allegedly in the hospital and unable to appear at the hearing (Tr. 13). However, the Trial Examiner offered to take his testimony at the hospital, if possible (*ibid.*). Respondent ignored this offer, and subsequently rested its case without adverting to the matter again (Tr. 58). Under these circumstances, it cannot now successfully maintain a claim of denial of due process.

together, these statements carried the unmistakable implication that the Union would order S & H's employees to cease working or threaten them with disciplinary action if they continued to work while the site was being picketed. The Board has pointed out that such conduct "amounts to a threat by the [Union] . . . that [it] would induce its members not to work for [the neutral subcontractor] while the picket line was in existence. Moreover, it is clear that this conduct goes beyond normal persuasion since [the neutral subcontractor] was faced with a possible loss of its contract and a suit for breach of contract if it was unable to complete its work because of inability to obtain needed [union employees]." *Carpenters Local Union No. 994, et al. (Interstate Employees Association)*, 159 NLRB 563, 566. Respondent's threat of economic action against Henderson in this case similarly constituted coercion within the meaning of Section 8(b)(4). See *N.L.R.B. v. District Council of Painters No. 48*, *supra*, at 111 (C.A. 9), cert. denied, 371 U.S. 914; *N.L.R.B. v. Local 825, Operating Engineers*, *supra*, at 697-698; *N.L.R.B. v. Local 3 IBEW (New York Telephone Co.)*, 325 F. 2d 561, 562 (C.A. 2).

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.[6]

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February 1968.

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[6] That respondent's conduct consisted of only one incident and that the picket line no longer exists does not render moot the Board's remedial order. For, "the determination of what constitutes serious harassment of an employer is one which the Board is competent to make, and falls in an area where the Courts should 'defer to the expertise of the Board to accept its determination that the violation is not *de minimis* and that there [is] a resultive injury or prejudice.' *N.L.R.B. v. Dal-Tex Optical Co.*, 310 F. 2d 58, 62 (C.A. 5)"; *Bakery Wagon Drivers & Salesmen, Local Union No. 484 v. N.L.R.B.*, 321 F. 2d 353, 356 (C.A.D.C.). It cannot be said that "there was no danger of recurrent violation . . . and that the Board was not justified in concluding that under all the circumstances, it was desirable to add the sanction of its order . . ." *Local 1967, United Brotherhood of Carpenters & Joiners of America v. N.L.R.B.*, 357 U.S. 93, 97, n. 2; *N.L.R.B. v. Local Union No. 751, United Brotherhood of Carpenters & Joiners of America AFL-CIO*, 285 F. 2d 633, 638 (C.A. 9).

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
*Assistant General Counsel,*
*National Labor Relations Board.*

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

### UNFAIR LABOR PRACTICES

Section 8

(b) It shall be an unfair labor practice for a labor organization or its agents --

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(b) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make the enter and decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency,shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

# APPENDIX B

## EXHIBITS

| NUMBER | FOR IDENTIFICATION | IN EVIDENCE |
|---|---|---|
| General Counsel's | | |
| 1(a) through 1(i) | 5 | 5 |